Supreme Court, U.S.
FILED

No. _____

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In The OFFICE OF THE CLERK

Supreme Court of the United States

MEREDITH ODEN,

Petitioner,

v.

NORTHERN MARIANAS COLLEGE,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether upon the expiration of the fifteen year appeal period provided for in 48 U.S.C. § 1824(a) for appeal from decisions of the Commonwealth Supreme Court to the Ninth Circuit, that court automatically loses jurisdiction of a timely filed appeal pending in the Ninth Circuit.

PETITION FOR WRIT OF CERTIORARI

Petitioner Meredith Oden (Oden) respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in this cause on March 6, 2006.

OPINIONS BELOW

The opinion of the Ninth Circuit is reported at 440 F.3d 1085 (9th Cir. 2006). The opinion of the Commonwealth Supreme Court was entered August 8, 2003 and is reported at 2003 MP 13.

STATEMENT OF JURISDICTION

The judgment sought to be reviewed was entered March 6, 2006. Jurisdiction is conferred on this court to review the judgment in question on a writ of certiorari under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

28 U.S.C. § 1367(d)

The period of limitations for any claim asserted under subsection (a), and for any other claim in the same action that is voluntarily dismissed at the same time as or after the dismissal of the claim under subsection (a), shall be tolled while the claim is pending and for a period of 30 days after it is dismissed unless State law provides for a longer tolling period.

48 U.S.C. § 1824(a)

The relations between the courts established by the Constitution or laws of the United States and the courts of the Northern Mariana Islands with respect to appeals . . . shall be governed by the laws of the United States pertaining to the relations between the courts of the United States including the Supreme Court of the United States, and the courts of the several States in such matters and proceedings, except as otherwise provided in article IV of the covenant: Provided, That for the first fifteen years following the establishment of an appellate court of the Northern Mariana Islands the United States court of appeals for the judicial circuit which includes the Northern Mariana Islands shall have jurisdiction of appeals from all final decisions of the highest court of the Northern Mariana Islands from which a decision could be had in all cases involving the Constitution, treaties or laws of the United States, or any authority exercised thereunder, unless those cases are reviewable in the District Court for the Northern Mariana Islands pursuant to section 1823 of this title.

THE CASE

Oden filed an action against the Northern Marianas College alleging violations of Title IX (20 U.S.C. § 1681). Jurisdiction lay in the District Court under federal question jurisdiction (28 U.S.C. § 1331). Oden included in her complaint certain ancillary claims pursuant to the supplemental jurisdiction of the District Court under 28 U.S.C. § 1367(a).

Those claims were dismissed and Oden filed an original action in the Commonwealth Superior Court under the tolling provisions of 28 U.S.C. § 1367(d). The Superior Court dismissed the complaint without addressing the tolling issue. Upon appeal to the Commonwealth Supreme Court, that court construed 28 U.S.C. §1367(d) against Oden. Appeal was taken to the Ninth Circuit under 48 U.S.C. § 1824(a) on September 4, 2003. On May 1, 2004, the time for appeal to the Ninth Circuit expired per 48 U.S.C. § 1824(a). The Ninth Circuit dismissed the appeal March 6, 2006, asserting it lost jurisdiction on May 1, 2004.

REASON FOR GRANTING THE WRIT

The issue posed to the Ninth Circuit was whether the court's jurisdiction extended to all appeals filed before May 1, 2004, or only to appeals determined before May 1, 2004. The Ninth Circuit followed *Santos v. Guam*, 436 F.3d 1051 (9th Cir. 2006), holding jurisdiction extended only to appeals decided before May 1, 2004.

The purpose of the appeal provisions in 48 U.S.C. § 1824(a) was to ensure that decisions from the new Commonwealth court system comported with American law, especially with respect to the federal Constitution and statutes. The Ninth Circuit's assertion that it lacks jurisdiction to decide timely appeals on those issues is not in accord with the intent of Congress. It is not reasonable to believe that Congress would create an appeal system that would guarantee some cases would never be decided, falling through a Congressionally created judicial crack.

The decisions cited in support of *Santos* (*supra*) are cases where the Congress affirmatively withdrew jurisdiction from a court. See *Bruner v. U.S.*, 343 U.S. 112 (1952); *Ex parte McCardle*, 74 U.S. 506 (1968); *Duldulao v. I.N.S.*, 90 F.3d 396 (9th Cir. 1996). There is nothing within section 1824(a) that indicates the Ninth Circuit would be divested of jurisdiction on timely filed appeals. See concept discussed in *Get Out Oil, Inc. v. Andrus*, 447 F.Supp. 40 (C.D. Cal. 1979), which cited *U.S. and Guaranty Co. v. U.S. ex rel. Struthers Wells Co.*, 209 U.S. 306 (1908) for the proposition that where such intent is not clearly indicated jurisdiction should remain.

CONCLUSION

The Ninth Circuit erred in dismissing this case for lack of jurisdiction. Oden requests that this petition be granted and Oden's appeal be heard by the Ninth Circuit.

Respectfully submitted,

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440 F.3d 1085

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MEREDITH ODEN,

Plaintiff-Appellant

v.

NORTHERN MARIANAS COLLEGE; AGNES MCPHETRES; JOHN DOES, I-V; BRUNO DALLA POZZA; BOARD OF REGENTS,

Defendants-Appellees.

No. 00-16594

D.C. No.
CV-98-00020-ARM

Appeal from the United States District Court
for the District of the Northern Mariana Islands
Alex R. Munson, Chief Judge, Presiding

MEREDITH ODEN,

Plaintiff-Appellant

v.

NORTHERN MARIANAS COLLEGE,

Defendants-Appellees.

No. 03-16802

D.C. No.
CV-01-00032-GA

OPINION

Appeal from the Supreme Court
of the Commonwealth of the Northern Mariana Islands
Demapan, Chief Justice, and Castro and Manglona,
Justices, Presiding

Argued November 1, 2004;
Resubmitted February 8, 2006
Honolulu, Hawaii

Filed March 6, 2006

Before: Melvin Brunetti, Susan P. Graber, and Jay S. Bybee, Circuit Judges.

Opinion by Judge Graber

COUNSEL

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Tred R. Eyerly, Honolulu, Hawaii, and F. Matthew Smith, Law Offices of Vincente T. Salas, Saipan, MP, for the defendants-appellees.

OPINION

GRABER, Circuit Judge:

This is a consolidated appeal from two judgments in favor of Defendants Northern Marianas College, its Regents, and its President. The first appeal is from the District Court for the Northern Mariana Islands (No. 00-16594). In that appeal we must determine whether the court's grant of summary judgment was proper on Plaintiff's claim that Defendants violated Title IX of the Civil Rights Act of 1972 by exhibiting deliberate indifference to the sexual harassment that she suffered at the hands of a College teacher. The second appeal is from a local court, the Supreme Court of the Commonwealth of the Northern Mariana Islands ("CNMI") (No. 03-16802). That appeal requires us to answer a preliminary jurisdictional question: whether, under 48 U.S.C. § 1824, we can consider appeals from a local CNMI court that were filed before, but remained pending after, May 1, 2004.

In the appeal from the district court (No. 00-16594), we conclude that summary judgment was proper because,

on this record, a reasonable finder of fact could conclude that Defendants acted with deliberate indifference to Plaintiff's complaint of sexual harassment. In the appeal from the CNMI Supreme Court (No. 03-16802), we conclude that in light of our recent decision, *Santos v. Guam*, No. 03-70472, 2006 WL 118375 (9th Cir. Jan. 3, 2006), we lack jurisdiction to decide an appeal that was filed before, but remains pending after, May 1, 2004.

Accordingly, in No. 00-16594 we affirm the district court's summary judgment in favor of Defendants, and in No. 03-16802 we dismiss the appeal from the CNMI Supreme Court's decision.

FACTUAL BACKGROUND

Plaintiff Meredith Oden enrolled in music classes at Northern Marianas College in January 1996. The hour-long classes were taught by Bruno Dalla Pozza, a friend of Plaintiff's father. Plaintiff received individual instruction from Dalla Pozza; no one else was present during her lessons. The lessons took place twice a week until Plaintiff stopped attending at the end of February 1996.

At first the interactions between teacher and pupil were innocuous. Dalla Pozza kissed Plaintiff on the cheek and gave her hugs. Plaintiff viewed that conduct as affectionate but not inappropriate, especially because early on it occurred in front of her father.

After Plaintiff began taking classes from Dalla Pozza, however, his behavior became increasingly inappropriate and disturbing to Plaintiff. He rubbed Plaintiff's back and then moved his hands downward to touch her buttocks. On a number of occasions he kissed her on the lips and forced

his tongue into her mouth. During one session he touched her breasts and rubbed his body against hers. Dalla Pozza also talked with Plaintiff about sexual topics and commented about her body.

After about six weeks of attending music classes with Dalla Pozza, Plaintiff met with a college counselor, Susan Satur, and informed her of Dalla Pozza's actions. Soon thereafter Satur and another college counselor, Lynn Newport, met with Plaintiff and her father.

The President of the College, Agnes McPhetres, learned of Plaintiff's allegations at the very earliest – crediting Plaintiff's father – in February 1996. McPhetres responded by assigning Satur and Newport to act as advocates for Plaintiff. They helped her drop Dalla Pozza's class. They met with her at least 14 times to provide counseling. Satur helped her prepare a formal complaint charging Dalla Pozza with sexual harassment; Plaintiff filed it on March 8, 1996.

Two days after Plaintiff filed her complaint, the College's Director of Human Resources met with Dalla Pozza regarding the allegations. The Director specifically informed Dalla Pozza that he was not to contact, or attempt to contact, Plaintiff in any way.

Ten days after filing her complaint, Plaintiff received a letter from McPhetres stating that, in accordance with College policy, Dalla Pozza had been given a copy of the complaint, and informing Plaintiff that he had denied the charges. Because of the denial, the College explained, Dalla Pozza could not be disciplined immediately. Plaintiff was told that she had 15 days within which to request a formal hearing. She did so, and the College began to form

an investigative Committee on Sexual Harassment in accordance with its policy.

After filing the complaint, Plaintiff continued to attend other classes at the College. She encountered Dalla Pozza twice, on campus, while her harassment claim was pending.

On the first occasion, Plaintiff was near a College snack bar when she saw Dalla Pozza across the room, and they made eye contact. She then ducked into a nearby restroom and hid in a stall. A few minutes later, she heard Satur, who happened to be washing her hands in the restroom, say hello to Dalla Pozza. He had stepped into the doorway of the women's restroom, apparently having followed Plaintiff there.

On a separate occasion, Plaintiff passed Dalla Pozza while walking across campus. He made an unintelligible comment to her.

The College's Human Resources Manual requires that a hearing be convened within 30 days after the filing of a formal complaint; that 30-day period expired on April 7, 1996. Notwithstanding that policy, the College did not hold a formal hearing on Plaintiff's complaint until January 3, 1997. Shortly after the hearing, the College's Committee on Sexual Harassment issued a written decision stating that it agreed unanimously that Dalla Pozza was "guilty of sexual harassment toward" Plaintiff. The Committee recommended disciplinary action, short of dismissal. McPhetres accepted the recommendation. She suspended Dalla Pozza without pay for four weeks, denied him a raise for one year, prohibited him from engaging in one-on-one instruction for two years, put him on probation for five years, and placed a letter of reprimand in his personnel file.

PROCEDURAL HISTORY

In 1998, Plaintiff filed a complaint in federal district court against Dalla Pozza, the Secretary of Education of the United States, and the College, its Regents, and its President. Plaintiff raised both federal and nonfederal claims. The court dismissed the claims against the Secretary of Education, a ruling that Plaintiff has not challenged. Additionally, the court entered summary judgment in favor of the College, its Regents, and its President, and dismissed all the supplemental nonfederal claims against those parties without prejudice. *See* 28 U.S.C. § 1367(c)(3); *Acri v. Varian Assocs., Inc.*, 114 F.3d 999, 1000 (9th Cir. 1997) (en banc) (holding that a district court has discretion to decline to exercise supplemental jurisdiction over nonfederal claims if it has dismissed all claims over which it had original jurisdiction).

In 2000, Plaintiff proceeded to trial against Dalla Pozza. A jury awarded her both general and punitive damages.

Following the entry of judgment on the jury's verdict, Plaintiff proceeded along two tracks. First, she timely appealed to this court, challenging the district court's summary judgment against her. The Ninth Circuit heard the appeal and issued an opinion in *Oden v. Northern Marianas College*, 284 F.3d 1058 (9th Cir. 2002), *vacated*, 539 U.S. 924 (2003). When the Supreme Court vacated that opinion it remanded the case for reconsideration in light of *Nguyen v. United States*, 539 U.S. 69, 83 (2003), which held that only Article III judges may comprise a court of appeals panel. As in *Nguyen*, the *Oden* court had included an Article IV district judge from CNMI, sitting by

designation. The case is now before the present panel, which consists entirely of Article III judges, on remand.

Meanwhile, in 2000, Plaintiff brought suit against the College in the CNMI Superior Court, asserting local-law claims arising from the sexual harassment to which Dalla Pozza had subjected her. The CNMI Superior Court dismissed the claims on the ground that the local two-year statute of limitations had run. Plaintiff appealed to the CNMI Supreme Court, which affirmed the dismissal of her claims. Plaintiff timely appealed to this court before May 1, 2004.

We have consolidated Plaintiff's appeal from the district court's summary judgment with her appeal from the CNMI Supreme Court.

STANDARD OF REVIEW

We review de novo a grant of summary judgment. *Buono v. Norton,* 371 F.3d 543, 545 (9th Cir. 2004). Likewise, we review de novo the interpretation of a federal statute. *Harper v. U.S. Seafoods LP,* 278 F.3d 971, 973 (9th Cir. 2002).

DISCUSSION

A. *District Court's Summary Judgment Under Title IX*

Title IX provides that no person "shall, on the basis of sex, . . . be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a). It is undisputed that the College receives federal financial assistance; the issue is whether, under the governing interpretation of Title IX, the record would

permit a finding for Plaintiff when all evidence is construed in her favor.

The Supreme Court, in *Gebser v. Lago Vista Independent School District*, 524 U.S. 274, 290 (1998), held that damages are available under Title IX only if "an official who at a minimum has authority to address the alleged discrimination and to institute corrective measures on the recipient's behalf has actual knowledge of discrimination in the recipient's programs and fails adequately to respond." The Court expressly declined to impose liability on "principles of *respondeat superior* or constructive notice," instead demanding actual notice to an official of the defendant. *Id.* at 285; *see also Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 641 (1999) (reinforcing the holding of *Gebser*).

McPhetres, President of the College, had authority to take corrective measures. She learned of Plaintiff's claims of sexual harassment against Dalla Pozza – according to Plaintiff's father – in February 1996. It is not disputed that she had prompt actual notice of the formal sexual harassment complaint, which was filed on March 8, 1996.

Plaintiff's main focus is on the second requirement of *Gebser*. She contends that the College reacted with deliberate indifference to her allegations of sexual harassment by delaying the formation of a committee and the commencement of a hearing for several months – indeed, until the following school year.

We must decide whether a reasonable fact-finder could conclude that the College's response was "clearly unreasonable in light of the known circumstances." *Davis*, 526 U.S. at 648. In other words, we must decide whether, on this record, one could find that the College made "an

official decision . . . not to remedy the violation." *Gebser*, 524 U.S. at 290.

The College began to act as soon as it became aware of Plaintiff's allegations. Two counselors were assigned to Plaintiff to provide psychological and practical support; they met with her more than a dozen times; they assisted her in filing a formal complaint; and they helped her drop Dalla Pozza's class immediately. After the complaint was filed, the College served it on Dalla Pozza. He was instructed not to have any contact with Plaintiff. Eventually a hearing took place, Plaintiff was believed, and Dalla Pozza was significantly disciplined.

Plaintiff rests her assertion of deliberate indifference first on a nine-month delay (April 1996 to January 1997) in convening a hearing. That delay contravenes College policy, because the Human Resources manual requires a hearing within 30 days after the filing of a formal complaint. Nonetheless the record fails to demonstrate that the delay was more than negligent, lazy, or careless. The College relied in part on its understanding that Plaintiff was looking for a lawyer to represent her and, later, in part on Plaintiff's move to New Mexico. Furthermore, there is no evidence in the record that the delay prejudiced Plaintiff. We need not and do not decide that a delay *never* can constitute deliberate indifference; we decide only that this record does not permit an inference that the delay was a deliberate attempt to sabotage Plaintiff's complaint or its orderly resolution.

Additionally, Plaintiff quarrels with the College's decision not to fire Dalla Pozza. But, even viewing the facts in Plaintiff's favor, we cannot conclude that a factual issue remains with respect to deliberate indifference. An

aggrieved party is not entitled to the precise remedy that he or she would prefer. Dalla Pozza was punished significantly for his improper actions. We need not and do not hold that a response that is inadequate *never* can amount to deliberate indifference; we hold only that the College's response in this case sufficed to avoid violation of Title IX.

In summary, we hold that the district court properly granted summary judgment in favor of Defendants on Plaintiff's Title IX claim.

B. *Ninth Circuit Jurisdiction Over Cases From the CNMI Supreme Court*

The United States and the Northern Mariana Islands entered into an agreement establishing a "self-governing commonwealth for the Northern Mariana Islands within the American political system." 48 U.S.C. § 1801. The Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States ("Covenant") provided for a court system in which the Ninth Circuit was to review appeals from the highest court of the CNMI for a limited period:

> [F]or the first fifteen years following the establishment of an appellate court of the Northern Mariana Islands the United States court of appeals [for the Ninth Circuit] shall have jurisdiction of appeals from all final decisions of the highest court of the Northern Mariana Islands from which a decision could be had in all cases involving the Constitution, treaties, or laws of the United States. . . .

Id. § 1824; *see also id.* § 1801 (setting out entire Covenant). After the 15-year period expired, relations between

the CNMI's judiciary and the federal judiciary would parallel relations between a state's judiciary and the federal judiciary. *Id.* § 1824. That is, appeals from the CNMI's highest court henceforth would be heard only by the Supreme Court of the United States. Marianas Political Status Commission, *Section by Section Analysis of the Covenant to Establish a Commonwealth of the Northern Mariana Islands* 37-38 (1975).

The CNMI Supreme Court was established on May 2, 1989, 1 N. Mar. I. Code § 3001, so the Ninth Circuit's jurisdiction over appeals from that court expired on May 1, 2004. The question presented here is whether our jurisdiction extends to all appeals filed before May 1, 2004, or only to appeals that were completed before May 1, 2004. In light of our recent decision in *Santos,* we adopt the latter interpretation.

In *Santos,* we considered a similar question regarding our jurisdiction to hear appeals from the Supreme Court of Guam. 2006 WL 118375, at *1. As it did with the CNMI, Congress provided for Ninth Circuit review of appeals from the highest local court of Guam for a period of 15 years. 48 U.S.C. § 1424-2 (2000). Guam's highest court was created in 1992; accordingly, the 15-year provision would not have expired until 2007. H.R. Rep. No. 108-638, at 2 (2004), *reprinted in* 2005 U.S.C.C.A.N. 2208, 2209. But on October 30, 2004, Congress amended 48 U.S.C. § 1424-2 by excising the portion of the statute that allowed for Ninth Circuit review of final appeals from the local Guam appellate courts. Pub. L. No. 108-378, § 2, 118 Stat. 2206 (2004) (codified at 48 U.S.C. § 1424-2 (Supp.2005)).

In *Santos,* we concluded that, because Congress repealed Guam's jurisdictional statute without including

an explicit savings clause allowing us to hear pending appeals, we lacked the power to hear or to decide the case. *Santos,* 2006 WL 118375, at *2. In *Santos, id.* at *1, we relied on the Supreme Court's admonition in *Bruner v. United States,* 343 U.S. 112, 116 (1952), that "when the jurisdiction of a cause depends upon a statute the repeal of the statute takes away the jurisdiction." (Internal quotation marks omitted.)

We see no principled distinction between Congress' repeal of the jurisdiction-providing statute in *Santos* and the natural expiration of a jurisdiction-providing statute, such as the one at issue here. In both cases Congress gave us jurisdiction to hear local appeals for a limited period; in both cases Congress stripped us of the right to hear those appeals as of a date certain, without including a savings clause to allow us to decide pending cases. "Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the [case]." *Ex parte McCardle,* 74 U.S. (7 Wall.) 506, 514 (1868).

CONCLUSION

In No. 00-16594, the appeal from the district court, we affirm the summary judgment in favor of the College, its Regents, and its President. In No. 03-16802, we dismiss Plaintiff's appeal from the CNMI Supreme Court for lack of jurisdiction.

No. 00-16594 AFFIRMED, No. 03-16802 DISMISSED.

2003 WL 24268081

FOR PUBLICATION

Appeal No. 01 0032 CA

IN THE SUPREME COURT OF THE COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

MEREDITH ODEN,
Plaintiff/Appellant,

v.

NORTHERN MARIANAS COLLEGE,
Defendant/Appellee.

OPINION

(Filed Aug. 8, 2003)

Cite as: *Oden v. Northern Marianas College*, 2003 MP 13
Civil Action No. 00-0359
Argued on June 21, 2002

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BEFORE: MIGUEL S. DEMAPAN, Chief Justice, ALEXANDRO C. CASTRO, Associate Justice, and JOHN A. MANGLONA, Associate Justice.

MANGLONA, Associate Justice:

¶1 Meredith Oden appeals from the trial court's dismissal, of her complaint, containing tort claims against Northern

Marianas College, on statute of limitations grounds. The appeal being timely, we have jurisdiction pursuant to N.M.I Const. art. IV, § 3 (amended 1997). We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

¶2 Meredith Oden ("Oden") brought this action against Northern Marianas College ("NMC") for damages sustained while attending NMC as a student. Specifically, Oden alleges that NMC negligently failed to supervise or control Bruno Dalla Pozza, an NMC instructor whom she contends sexually harassed and molested her from the period between January 6, 1996 and April 10, 1996. Excerpts of Record ("ER") at 4 (Summons/Complaint).

¶3 In April of 1998, Oden filed a complaint in Federal District Court against Dalla Pozza and NMC, alleging sexual harassment, battery, negligent supervision and other claims. ER at 3 (Order Granting Motion to Dismiss). On October 29, 1999, the Federal District Court declined to exercise supplemental jurisdiction over Oden's common law negligence claims and dismissed them without prejudice pursuant to 28 U.S.C. § 1367.[1] *Oden v. Northern Marianas College,* Civ. Action No. (D.N.M.I. Oct. 29, 1999) (Order Re: Motion for Summary Judgment and Dismissing Common Law Claims without Prejudice).

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[1] 28 U.S.C. § 1367 generally provides that a district court, when considering claims over which the court has jurisdiction because the claims involve federal questions, must exercise supplemental jurisdiction over other related claims that are part of the same case or controversy. 28 U.S.C. § 1367(a). The statute further provides, however, that the district court may decline to exercise supplemental jurisdiction over such claims and dismiss them without prejudice in certain circumstances. 28 U.S.C. § 1367(c).

¶4 The District Court entered final judgment in the action dismissing all claims on July 17, 2000. ER at 3 (Order Granting Motion to Dismiss). On August 16, 2000, Oden brought the present action in the Commonwealth's trial Court. *Id.* On September 20, 2000, NMC moved to dismiss, asserting, among other things, that the two-year statute of limitations for negligence claims in 7 CMC § 2503(d) barred the complaint. *Id.*

¶5 On October 10, 2001, the Commonwealth trial court granted the motion to dismiss, holding that Oden's claims are time-barred. *Id.* The trial court stated that since the actions upon which Oden based her complaint occurred January 1996 through April 1996 and since she did not file her complaint until August 16, 2000, her action was barred by the two-year statute of limitations. *Id.* The court further held that neither 28 U.S.C. § 1367(d) nor the equitable tolling doctrine tolled the running of the limitations period. *Id.*

QUESTIONS PRESENTED AND STANDARDS OF REVIEW

¶6 We consider the following questions:

1. Whether 28 U.S.C. § 1367(d), a federal tolling statute, saves Oden's claims from being barred by the statute of limitations. This is a question of law subject to *de novo* review. *Zhang v. Commonwealth,* 2001 MP 18 ¶ 9 (2001).

2. Whether the doctrine of equitable tolling saves Oden's claims from being barred by the statute of limitations. This is a question of law subject to *de novo* review. *Id.* at ¶ 10.

ANALYSIS

I. Commonwealth Rules of Civil Procedure 12(b)(6) Standard

¶7 In examining a trial court's dismissal under Com. R. Civ. P. 12(b)(6), we review the contents of a complaint by construing it in the light most favorable to the plaintiff and accepting all well-pleaded facts as true. *Sablan v. Tenorio,* 4 N.M.I. 351, 355 (1996). The failure to file a complaint within the limitations period is sufficient to support a Rule 12(b)(6) dismissal. *Zhang, supra,* at ¶11, citing *Hutton v. Realty Executives, Inc.,* 14 P.3d 977, 979 (Alaska 2000). The statute of limitations defense must be apparent from the face of the complaint, but a court may take judicial notice of matters of public record. *Id., citing Truitt v. Metropolitan Mortg. Co.,* 609 So.2d 142, 143 (Fla. Ct. App. 1992) and *Lee v. City of Los Angeles,* 250 F.3d 668 (9th Cir. 2001).

II. 28 U.S.C. § 1367(d)

¶8 Oden argues that 28 U.S.C. § 1367(d) ("Section 1367(d)") tolled the running of the two-year statute of limitations on her common law claims filed in this action. Section 1367(d) applies to those non-federal claims over which the district court declines to exercise supplemental jurisdiction. The statute states that the limitations period for any such claim "shall be tolled while the claim is pending [in federal court] and for a period of 30 days after it is dismissed unless State law provides for a longer tolling period." 28 U.S.C. § 1367(d).

¶9 Oden states that the time to file suit in Commonwealth court should run for thirty days from the final judgment in the entire federal action and not from the

dismissal of the claims over which the district court declined to exercise supplemental jurisdiction. She asserts that there is no definitive case law regarding when the tolling period ends and, since a party generally may only appeal final determinations, the tolling period should start running from final determinations as well. Therefore, contends Oden, since she filed her common law claims in the Commonwealth court within thirty days of the dismissal of her remaining claims in federal court, the two-year statute of limitations does not bar her claims. We disagree.

A. Plain Language

¶10 The Court's primary basis for statutory interpretation is the plain language of the statute. Only when such statutory language is unclear will the Court's analysis venture outside the plain wording of the statute. *Limon v. Camacho,* 5 N.M.I. 21, 28 (1996), *citing Office of Att'y. Gen. v. Deala,* 3 N.M.I. 110, 117 (1992).

¶11 Oden's argument attempts to inject complexity and ambiguity into a statute with simple and clear wording. Section 1367(d) states plainly that the period of limitations shall be tolled for any claim over which the district court declines to exercise supplemental jurisdiction "while the claim is pending and for a period of 30 days after it is dismissed." This explicit language spells out exactly when the limitations period runs, namely, thirty days after the district court dismisses the claim.

¶12 Nowhere in the statute does the plain language suggest, as Oden contends, that the limitations period runs thirty days from when the federal court disposes of the entire action. The statute unequivocally states that the

limitations period will run thirty days from when the district court dismisses the *claim,* not the *action.* Accordingly, analysis of the plain language of Section 1367(d), which is the Court's principal method of statutory interpretation, leads to the conclusion that the limitations period runs from the date the district court dismisses the supplemental claims and not the date of final disposition of the entire action.

B. Case Law

¶13 It is true, as Oden asserts, that there is no definitive case law to shed light on this issue. One case, *Lucas v. Muro Pharm.*, 1994 Mass. Super. LEXIS 462 (1994), discusses the issue of when the limitations period runs under Section 1367(d), but in a different context than the present case. In *Lucas,* the district court dismissed the plaintiff's entire action, which included federal discrimination claims and supplemental state law claims, on the same date. The plaintiff appealed the dismissal, and the First Circuit affirmed.

¶14 The question before the Massachusetts Superior Court in *Lucas* was whether the thirty-day limitations period ran from the district court's dismissal or the First Circuit's determination. *Id.* at 6. The *Lucas* Court held that the limitations period ran from the First Circuit's decision, reasoning that it would be a waste of judicial resources to necessitate a filing in state court when a pending appeals court decision may obviate that need. *Id.* at 8.

¶15 The *Lucas* situation is inapplicable to the instant case. In *Lucas,* the plaintiff was waiting to see if the appeal eliminated the need to file in state court. The *Lucas*

court found that it was not necessary to require filing in state court while waiting for an appellate decision that would determine whether such a filing was even needed.

¶16 Here, Oden has not asserted that she appealed the District Court's dismissal of her supplemental claims. She went directly to Commonwealth court to vindicate those claims, and she has not furthered any reason why she waited until the District Court disposed of her federal claims to do this. Therefore, the judicial economy notion is not involved here.

¶17 Where no appeal of the dismissal is filed, such as in the present situation, a filing in Commonwealth court is inescapable if the claimant wishes to vindicate those claims, regardless of what happens to the remaining federal claims. In *Lucas,* the decision of whether to file in state court depended on what happened in the appeal, whereas here, the decision of whether to file in the Commonwealth courts had no relation to the disposition of the remaining federal claims. Oden would have had to file in the Commonwealth courts anyway, as the only question was when, not whether. Thus, our reading of Section 1367(d), that in this situation the limitations period runs from the date of dismissal of the supplemental claims, will not require a possibly unnecessary filing in the Commonwealth courts. Therefore, *Lucas* is not relevant to this inquiry.

¶18 We agree with the trial court that Section 1367(d) does not save Oden's claims from being time-barred. As applied to this set of facts, the tolling period in Section 1367(d) runs from the date of the district court's dismissal and not from the date of final disposition of the action.

¶19 Oden's concern that filing in Commonwealth courts within thirty days of dismissal would lead to the possibility of inconsistent determinations in multiple jurisdictions is overblown. If this danger exists, the Commonwealth courts could stay the case until the district court disposes of the federal claims.

III. Equitable Tolling

¶20 Oden argues that the doctrine of equitable tolling saves her claim from being barred by the two-year statute of limitations. We disagree. Although we have never applied this doctrine, we discussed equitable tolling in *Zhang, supra*.[2] We stated that this doctrine, recognized in California and other jurisdictions, in certain circumstances relieves a party from the statute of limitations when renewing a claim previously filed in federal court. *Id.* at ¶18, *citing Addison v. State of California,* 145 Cal.Rptr. 224, 228, 578 P.2d 941, 944-45 (Cal. 1978) and *Collier v. City of Pasadena,* 191 Cal.Rptr. 681, 684 (1981). The rationale is that it would be "'inefficient, awkward and laborious'" to pursue actions simultaneously in both federal and state court when the actions are based on the same facts. *Id.*, *quoting Addison, supra*, 578 P.2d at 944.

¶21 In *Zhang,* we outlined three factors considered when deciding whether to apply equitable tolling: (1) the defendant must receive timely notice of the claims; (2) the defendant must suffer no prejudice from the delay; and (3)

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[2] Even though we issued the *Zhang* decision two months before Oden filed her appellate brief, Oden fails to mention *Zhang* in her brief. We assume that this failure to discuss the leading case in the Commonwealth on equitable tolling was only a major oversight by Oden's counsel and not an attempt to intentionally mislead the Court.

the plaintiff must act reasonably and in good faith. *Id.* at ¶19, *citing Collier, supra,* at 684 and *Ervin v. County of Los Angeles,* 848 F.2d 1018, 1019 (9th Cir. 1988). We added that since a defendant receives proper notice of the initial federal suit, the first two elements are usually undisputed, which makes the third element the most determinative. *Id., citing Kolani v. Gluska,* 75 Cal.Rptr.2d 257, 261 (Cal. Ct. App. 1998).

¶22 To elaborate on the meaning of this third element, we recognized that a late filing that results from counsel's misreading of a statute's allowable refiling period is "'at best . . . a garden variety claim of excusable neglect'" that will not invoke equitable tolling. *Id.* at ¶20, *quoting Irwin v. Dep't of Veterans Affairs,* 498 U.S. 89, 96, 111 S.Ct. 453, 458, 112 L.Ed.2d 435 (1990), *reh'g denied* 498 U.S. 1075, 111 S.Ct. 805 (1991). In the present situation, Oden's counsel misread Section 1367(d), contorting the statute's plain wording from thirty days from the dismissal of the supplemental claims to thirty days from the disposition of the entire action. Therefore, according to *Zhang,* this situation is undeserving of equitable tolling.

¶23 Further discussing this third element in the equitable tolling analysis, we stated that an excessive time interval between the dismissal and the new filing date cannot be "reasonable" without extraordinary extenuating circumstances. *Id., citing Kolani,* 75 Cal.Rptr.2d at 262. After analyzing *Kolani,* which found that the longest delay ever allowed under the doctrine was thirty days, we found that the two-month delay by the plaintiff was excessive and unreasonable. *Id.* at ¶21-22.

¶24 In the present situation, the delay was nearly ten months. Oden asserts that she was lulled into not filing

her action sooner because NMC urged her not to file her civil action until NMC had a chance to resolve the claims internally through their administrative process. This explanation begs the question as to why NMC's actions prevented her from filing her action in the Commonwealth courts but not from filing the exact same claims in federal court. Not only is the excessive delay of almost ten months unreasonable, but Oden's purported explanation for this delay is irrational as well.

¶25 Therefore, we agree with the trial court that equitable tolling should not be applied to save Oden's claims.[3]

CONCLUSION

¶26 For the foregoing reasons, the trial court's order dismissing the complaint is **AFFIRMED**.

So Ordered this 8 day of August, 2003.

/s/ Miguel Demapan
MIGUEL S. DEMAPAN,
Chief Justice

/s/ Alexandro Castro
ALEXANDRO C. CASTRO,
Associate Justice

/s/ John Manglona
JOHN A. MANGLONA,
Associate Justice

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[3] Because the statute of limitations bars Oden's claims, we do not need to reach the question as to whether a direct action exists against NMC under the Commonwealth Constitution.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN MARIANA ISLANDS

MEREDITH ODEN, Plaintiff v. NORTHERN MARIANAS COLLEGE; AGNES MCPHETRES, its President; RICHARD RILEY, U.S. Secretary of Education; JOHN DOES 1 through 5, being its Board of Regents; and, BRUNO DALLA POZZA, Defendants	Civil Action No. 98-0020 ORDER GRANTING DEFENDANTS NMC, BOARD OF REGENTS, AND McPHETRES' MOTION FOR SUMMARY JUDGMENT and DISMISSING SUPPLEMENTAL COMMON LAW CLAIMS WITHOUT PREJUDICE (Filed Oct. 29, 1999)

THIS MATTER came before the court on Thursday, October 28, 1999, for hearing of the motion of defendant Northern Marianas College ("NMC"), NMC President McPhetres, and the Board of Regents' motion to dismiss, for judgment on the pleadings, or for summary judgment, or, in the alternative, to strike portions of the complaint. Plaintiff appeared by and through her attorney, Douglas F. Cushnie; Assistant Attorney General Sean Frink appeared on behalf of the movants.

THE COURT, having considered the written and oral arguments of counsel, rules as follows:

The second amended complaint contains five causes of action, some of which contain more than one count. This motion[1] concerns only the first three causes of action.[2]

The first cause of action is a Title IX sexual harassment claim made against defendant NMC for failure to adequately control defendant Dana Pozza.

The second cause of action has two counts, both of which are directed to the College itself and to all members of the Board of Regents, plus President McPhetres, in their individual capacities. The first count of the second claim is a 42 U.S.C. § 1983 claim for failure to train, discipline, and control Dalla Pozza, based upon a violation of Title 20 U.S.C. § 1681, and the Fifth and Fourteenth Amendments to the United States Constitution. The second count of the second cause of action alleges the same facts, but as the bases for a common law negligence claim.

The third cause of action also has two counts, against NMC, President McPhetres in her official capacity, and the Board of Regents and its members in their official capacities. The first count is also for violation of 42 U.S.C. § 1983, based on violation of the same three provisions

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[1] This amended motion (amended August 27, 1999, but still relying upon defendants' July 8, 1999, memorandum and other filings to support the motion) is directed to plaintiffs second amended complaint, filed August 14, 1998. The intervening year was used by the parties to conduct discovery.

[2] The fourth cause of action has four counts, all against defendant Dalla Pozza, and are not involved in this motion. The fifth cause of action is against the U.S. Secretary of Education, but it was dismissed by an order issued in October, 1998, after the second amended complaint had been filed.

cited in the preceding paragraph. The second count is another claim for common law negligence.

First Cause of Action –
Title IX Against NMC for Failure to Control

This Title IX[3] sex discrimination (20 U.S.C. § 1681) cause of action is against NMC as an entity. After the court's previous order which ruled favorably on defendants' statute of limitations defense, only incidents occurring after April 9, 1996, remain actionable. The second amended complaint refers to the "bathroom incident" (where defendant Dalla Pozza allegedly "cornered" plaintiff on April 10, 1996) and, sometime after the "bathroom incident" but before January 4, 1997 (the date of defendant Dalla Pozza's administrative hearing), "Dalla Pozza made threatening and offensive gestures to Plaintiff while on the NMC campus which caused Plaintiff to be fearful for her safety." (¶ 12, Second Amended Complaint).

Because of the dearth of case law involving Title IX lawsuits, courts use Title VII sexual harassment cases when analyzing Title IX cases. *See e.g. Mabry v. State Bd., of Community Colleges & Occupational Educ.*, 813 F.2d 311 (10th Cir. 1987) (courts should turn to case law concerning employment-related sex discrimination under title VII for guidance if confronted with employment-related allegation of discrimination under Title IX).

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[3] Title IX provides in part:

> No person in the United States shall, on the basis of sex, be excluded from participation in, denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance[.]

The answer here is mandated by the case law:

> Because the express remedial scheme under Title IX is predicated upon notice to an "appropriate person" and an opportunity to rectify any violation, 20 U.S.C. § 1682, we conclude, in the absence of further direction from Congress, that the implied damages remedy should be fashioned along the state lines. An "appropriate person" under § 1682 is, at a minimum, an official of the recipient entity with authority to take corrective action to end the discrimination. Consequently, in cases like this one that do not involve official policy of the recipient entity, we hold that a damages remedy will not lie under Title IX unless an official who at a minimum has authority to address the alleged discrimination and to institute corrective measures on the recipient's behalf has actual knowledge of discrimination in the recipient's programs and fails adequately to respond.
>
> We think, moreover, that the response must amount to deliberate indifference to discrimination. The administrative enforcement scheme presupposes that an official who is advised on a Title IX violation refuses to take action to bring the recipient into compliance. The premise, in other words, is an official decision by the recipient not to remedy the violation.
>
> * * *
>
> The issue in this case, however, is whether the independent misconduct of a teacher is attributable to the school district that employs him under a specific federal statute designed primarily to prevent recipients of federal financial assistance from using the funds in a discriminatory manner. Our decision does not affect any right of

> recovery that an individual may have against a school district as a matter of state law or against the teacher in his individual capacity under state law or under 42 U.S.C. § 1983. Until Congress speaks directly on the subject, however, we will not hold a school district liable in damages under Title IX for a teacher's sexual harassment of a student absent actual notice and deliberate indifference.

Gebser v. Lago Vista Indep. School District, 118 S.Ct. 1989, 1999-2000 (1998).

Here, plaintiff made a complaint, defendant NMC held a hearing, and defendant Dalla Pozza was disciplined. While one might argue that the complaint: was not acted upon with sufficient promptness, or that the discipline meted out was too meager, that is not the standard. The standard is "deliberate indifference" to *discrimination and, as a matter of law, plaintiff cannot show that.* For that reason, there being no genuine issue as to any material fact, defendants are entitled to judgment as a matter of law on the first claim for relief.

Third Cause of Action – Count I

Against NMC, President McPhetres in her official capacity, and the Board of Regents and its members in their official capacities. Count I is for violation of § 1983, based on violation of failure to train, discipline, and control Dalla Pozza, based upon a violation of Title 20 U.S.C. § 1681, and the Fifth and Fourteenth Amendments.

In its order of July 28, 1998, the court addressed the issue of the potential liability of the individual defendants in their official capacities:

The parties are in agreement that, if Northern Marianas College is deemed an "arm of the state," all § 1983 claims against the individual defendants in their official capacities must be dismissed, as per *Magana v. CNMI*, 107 F.3d 1436, 1443 (9th Cir. 1997) and earlier cases.[4] As defendants note, this defect cannot be cured by amendment and, accordingly, any claim for relief alleged on this ground must be dismissed with prejudice.

However, plaintiff claims NMC is autonomous from the Commonwealth government and that neither it nor its employees acting in their

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[4] It is settled law that the Commonwealth of the Northern Mariana Islands, ("CNMI"), its governmental entities, and officials sued in their official capacities are not "persons" within the meaning of § 1983 and cannot be held liable under the statute. *See Ngiraingas v. Sanchez*, 495 U.S. 182, 191-192 (1990); *DeNieva v. Reyes*, 966 F.2d 480, 483 (9th Cir. 1992); *Magana v. CNMI*, 107 F.3d 1436, 1447 (9th Cir. 1997). There is but one exception to the general rule that the CNMI, its governmental entities, and officials sued in their individual capacities are not "persons" within the meaning of 42 U.S.C. §1983: An official of a state or territory, when sued for prospective injunctive relief in his or her official capacity, is considered a "person" for § 1983 purposes. *Guam Soc. of Obstetricians & Gynecologists v. Ada*, 962 F.2d 1366, 1371 (9th Cir.), *cert. denied*, 506 U.S. 1011 (1992); *see also Doe v. Lawrence Livermore Nat. Laboratory*, 65 F.3d 771, 774-776 (9th Cir. 1995), reversed on other grounds, *Regents of the University of California v. Doe*, ___ U.S. ___, 117 S.Ct. 900, 904 (1997) (holding that state official is "person" within the meaning of § 1983 in suit seeking prospective injunctive relief). This is because "official-capacity actions for prospective relief are not treated as actions against the State." *Kentucky v. Graham*, 473 U.S. 159, 167 n.14 (1985). Thus, in addition to barring a § 1983 claim for money damages against the CNMI, the law also does not allow the maintenance of a § 1983 action against the CNMI, as an entity, for prospective injunctive relief. It follows then, that a claim for prospective injunctive relief against a governmental entity that is considered an 'arm of the State' also will not lie. *Doe*, 65 F.3d at 774-776; *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 70 (1989).

official capacities are entitled to any form of sovereign immunity. Because the record before the court has not yet been fully developed, the court declines to issue a final ruling on this aspect of government defendants' motion at this time. However, from the materials currently on file and available to the court, it appears that Northern Marianas College is indeed an "arm of the state" and would thus be accorded sovereign immunity. The court reaches this tentative conclusion based upon a traditional "arm of the state" analysis: 1) whether a money judgment against the College would be satisfied out of Commonwealth fund, 2) whether the College performs central government functions, 3) whether the college may sue or be sued, 4) whether the College has the power to take property in its own name or only in the name of the Commonwealth, and 5) the corporate status of the College. *Mitchell v. Los Angeles Community College Dist.*, 861 F.2d 198, 201 (9th Cir. 1998), *cert. denied* 490 U.S. 1081, 109 S.Ct. 2102 (1989); *Doe v. Lawrence Livermore Nat. Laboratory*, 65 F.3d 771, 774-776 (9th Cir. 1995), reversed on other grounds, *Regents of the University of California v. Doe*, ___ U.S. ___, 117 S.Ct. 900, 904 (1997). Of these factors, "[s]tate liability for money judgment is the single most important factor in determining whether an entity is an arm of the state." *Id.* 65 F.3d at 774.

The Commonwealth Constitution, Art. XV, section 2, provides:

> *Higher and Continuing Education*: a) The legislature shall establish by law a Northern Marianas College that shall be headed by a president. The president of the college shall be appointed by a representative board of

> regents. The board of regents shall be appointed to staggered terms by the governor and shall have autonomy in the administration of its affairs and shall formulate policy[.]

The Northern Mariana Islands Code addresses the status, duties, and powers of Northern Marianas College in several sections:

> 3 N.Mar.I. Code § 1304. "*Northern Marianas College.* (a) There is *in the Commonwealth government* a Northern Marianas College to be headed by a president of the college appointed by the Board of Regents. (b) the Northern Marianas College is established as a nonprofit public corporation under the general control and direction of a board designated as the Board of Regents of Northern Marianas College which is hereby created, and it shall enjoy all powers conferred by law upon a public corporation * * * " (emphasis added)
>
> 3 N.Mar.I. Code § 1316. "*Board of Regents: Duties of the Board.* The board has the following duties:
>
> * * *
>
> (g) To acquire . . . any property.
>
> * * *
>
> (j) To act as the state board of higher education for the Commonwealth for purposes of federal law.
>
> * * *
>
> (l) *In consultation with the Governor, to approve the budget of the college and to have*

> *the budget submitted to the legislature pursuant to 1 CMC [N.Mar.I Code] §7206.* (emphasis added)
>
> (s) To enter into and perform such contracts . . . or other transactions as may be necessary in the conduct of its business[.]"
>
> 3 N.Mar.I. Code §1331. "*Northern Marianas College: Appropriation. Aside from such additional sums as may be appropriated* annually by the legislature for its financial support, the college shall be guaranteed an annual budget of not less than $6,000,000 or one percent of the general revenues of the Commonwealth, whichever is greater[.]" (emphasis added)

On balance, the court tentatively concludes that NMC is a part of the Commonwealth government. Its limited measures of autonomy do not appear to outweigh its acknowledged place "in the Commonwealth government." 3 N.Mar.I. Code § 1304. Also militating against a finding that the College exists wholly separate from the Commonwealth government is the fact that it is often represented in its legal affairs by the Commonwealth Attorney General's Office.

As indicated earlier, the information presently before the court is insufficient to rule definitively at this time. Plaintiff and defendants will be allowed an opportunity to brief and argue this issue, if the claim is included in the amended complaint, when discovery has been concluded.

It is now many months later, and plaintiff has presented nothing new, despite the court's invitation and

despite the intervening discovery; rather, she continues to make the same arguments now that she made before. A ruling on the question of whether or not NMC is an "arm of the state" is now appropriate and the court hereby adopts as its final ruling the tentative ruling made in the July 28, 1998, order: defendant NMC is an "arm" of the Commonwealth government and thus these individual defendants cannot be sued in their official capacities. Accordingly, their motion for summary judgment is granted.

Second Cause of Action – Count I

42 U.S.C. § 1983 Action Against College itself, All members of the Board of Regents, plus President McPhetres, in their individual capacities – Failure to train, discipline, and control Dalla Pozza, based upon a violation of Title 20 U.S.C. § 1681, and the Fifth and Fourteenth Amendments.

A § 1983 claim seeking to impose liability on defendants as individuals must overcome their claim of qualified immunity. Based on the analysis in the foregoing section, the court sees no reasonable chance the plaintiff could surmount the relevant standard: "Government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 102 S.Ct. 2727 (1982). It was not until the *Gebser* decision last year that the "deliberate indifference" standard of conduct for defendants was set by the Supreme Court. Based on the court's conclusion above that defendants here did not violate the *Gebser* standard, it follows that defendants have qualified

immunity from suit, and summary judgment is hereby entered in their favor.

Common Law Negligence Claims

"The district courts may decline to exercise supplemental jurisdiction over a claim . . . if – (3) the district court had dismissed all claims over which it has original jurisdiction." 28 U.S.C. § 1367(c). All federal claims having been dismissed, the court exercises its discretion to dismiss without prejudice the supplemental common law claims for negligence.

IT IS SO ORDERED.

DATED this 29th day of October, 1999.

/s/ Alex R. Munson
ALEX R. MUNSON
Judge

IN THE SUPERIOR COURT

FOR THE

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

MEREDITH ODEN,	)	
Plaintiff,	)	**Civil Action No. 00-359B**
vs.	)	
NORTHERN MARIANAS COLLEGE,	)	**ORDER GRANTING MOTION TO DISMISS**
Defendant.	)	(Filed Oct. 10, 2001)

INTRODUCTION

¶1 This case presents a question of first impression concerning whether the statute of limitations on Plaintiff's claims for negligent supervision and failing to implement and comply with regulations were tolled during the period that she pursued her sexual harassment claims in an administrative grievance procedure and later in Federal court. The matter came before the court on November 29, 2000, on the motion of Defendant Northern Marianas College ("NMC") to dismiss (the "Motion"). Although F. Matthew Smith appeared for NMC, counsel for Plaintiff failed to appear.[1] At the hearing, the court announced its ruling granting the motion to dismiss. In light of the questions presented, the court decided to issue a written opinion explaining its ruling. The following represents the court's reasoning on this matter.

[1] Counsel for NMC represented to the court that one day prior to the hearing, Plaintiff's counsel, Douglas Cushnie, filed a request to appear telephonically. No such request, however, was before the court.

I. BACKGROUND

¶2 Plaintiff brought this action against NMC for damages sustained while attending NMC as a student. Plaintiff contends that NMC instructor, Bruno Dalla Pozza, sexually harassed and molested her in or around January and February of 1996, and that even after she filed a complaint with the college in March of 1996, the harassment and intimidation continued. Plaintiff further contends that NMC and College officials knew that Dalla Pozza had previously harassed women in a manner similar to his treatment of Plaintiff, failed to take any action to stop him, and allowed Dalla Pozza to continue in its employ. *See* Complaint at ¶¶ 19-22. Plaintiff thus charges NMC with negligent supervision and control of Dalla Pozza and with failing to implement and abide by college regulations. Plaintiff maintains that by failing to control and discipline Dalla Pozza, and by refusing to implement and comply with its own regulations, NMC violated her rights to due process and equal protection under the Fourteenth Amendment to the United States Constitution as well as Article I, §§ 5 and 6 of the Commonwealth Constitution.

¶3 To vindicate her claims, in March of 1996 Plaintiff initially brought a complaint against Dalla Pozza with the College, for, among other things, sexual harassment and battery. Complaint at ¶11. When the College found Dalla Pozza guilty of sexual harassment in 1997, Dalla Pozza appealed. *Id.* at ¶ 17. Although Dalla Pozza withdrew the appeal in January of 1998, Plaintiff contends that she was required to await final instructions from the Board of Regents before filing a lawsuit. *Id.* at ¶16-18. Plaintiff maintains that she received final instructions from the Office of the Attorney General on March 18, 1998 and filed

her complaint in Federal Court one month later, in April of 1998. *Id.* at ¶ 18.

¶4 On October 29 1999, the District Court declined to exercise supplemental jurisdiction over Plaintiff's common law negligence claims and dismissed them without prejudice pursuant to 28 U.S.C. § 1367. *See Oden v. Northern Marianas College*, Civil Action No. 98-0020 (D.N.M.I. Oct. 29, 1999) (Order Re: Motion for Summary Judgment and Dismissing Common Law Claims Without Prejudice). Final judgment dismissing all claims was entered by the Federal Court on July 17, 2000. On August 16, 2000, Plaintiff brought this action in the Commonwealth Superior Court, and on September 20, 2000, NMC moved to dismiss, asserting the Complaint was barred by the statute of limitations; that Plaintiff's claims were barred by sovereign immunity; and that there is no direct cause of action under the United States or Commonwealth Constitution for the claims asserted by Plaintiff.

II. QUESTIONS PRESENTED

¶5 Whether Plaintiff's claims for negligent supervision are barred by the two year statute of limitations set forth [sic] 7 CMC § 2503.

¶6 Whether Plaintiff has a direct cause of action under the Fourteenth Amendment to the United States Constitution and Article I, §§ 5 and 6 of the Commonwealth Constitution for a violation of her rights to due process and equal protection of law.

¶7 Whether Plaintiff's claims are barred by the doctrine of sovereign immunity.

III. ANALYSIS

¶8 In considering a motion to dismiss for failure to state a claim upon which relief can be granted, "the Court must accept the allegations in the complaint as true and construe them in the light most favorable to the plaintiff." *Govendo v. Micronesian Garment Mfg., Inc.*, 2 N.M.I. 270, 283 (1991). Dismissal is improper unless the plaintiff can prove no set of facts in support of his claim that would entitle him to relief. *Id.* Accordingly, "[t]he defendant must . . . demonstrate that, even after taking the well pleaded facts as true, the plaintiff still fails to state a claim for relief." *Govendo v. Marianas Public Land Corp.*, 2 N.M.I. 482, 490 (1992). When a motion to dismiss is based on the running of the statute of limitations, moreover, the motion should only be granted when "the assertions of the complaint, read with the required liberality, would not permit the plaintiff to prove that the statute was tolled." *Cervantes v. City of San Diego*, 5 F.3d 1273, 1274 (9th Cir. 1993), *quoting Jablon v. Dean Witter & Co.*, 614 F.2d 677, 682 (9th Cir. 1980).

¶9 The Commonwealth's two-year statute of limitations for personal injury actions applies to Plaintiff's negligence claims. See 7 CMC § 2503(d).[2] In the instant case, the

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[2] Since Plaintiff alleges the tort of "common law negligence," the applicable statute of limitations period is set forth at 7 CMC § 2503(d). 7 CMC § 2503 states, in pertinent part:

> The following actions shall be commenced only within two years after the cause of action accrues:
>
> (a) Actions for assault and battery, false imprisonment, or slander;
>
> (b) Actions against the Director of Public Safety, a police officer or other person duly authorized to serve process, for

(Continued on following page)

harassment and molestation of which Plaintiff complains occurred from January through April of 1996. Assuming, without deciding, that Plaintiff's claims for negligent supervision accrued at the time of the last act of harassment or molestation, Defendant argues that the action is time-barred because the conduct at issue took place more than two years prior to the filing of the complaint in this case.

¶10 Plaintiff counters that under NMC's grievance procedures, she was not free to file an action until March 18, 1998, when she received final instructions from the Board of Regents. Plaintiff insists that since she filed a grievance less than one month after the harassment occurred and brought the federal action one month after administrative proceedings terminated, the federal action was timely filed. In addition, Plaintiff argues that under 28 U.S.C. § 1367(d), state claims that are dismissed by the Federal Court may be brought in local court within thirty days "of the final dismissal." Plaintiff maintains that since final judgment on all claims was entered on July 17, 2000, the Complaint was timely filed pursuant to the tolling provisions of 7 CMC § 2506 and 28 U.S.C. § 1367(d).

¶11 The first step in determining when a statute of limitations period begins and ends is to calculate the date on which the cause of action "accrued." Pursuant to 7 CMC § 2512, a cause of action "accrues" as soon as the right to

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any act or omission in connection with the performance of official duties;

(c) Actions for malpractice . . .

(d) Actions for injury . . . caused by the wrongful act or neglect of another . . .

maintain a legal action arises. *See Rios v. Marianas Public Land Corp.*, 3 N.M.I. 514, 522-523 (1993). Ordinarily, a cause of action accrues at the time of the act giving rise to the alleged injury or damage. *See, e.g., Salzman v. Prudential Securities, Inc.*, 1994 WL 191855 (S.D.N.Y. May 16, 1994) (cause of action for a negligent supervision claim accrues upon the occurrence of the last wrongful act); *Alaska Dep't of Corrections v. Welch*, 805 P.2d 979, 981-82 (Alaska 1991) (statute of limitations on claim for negligent supervision began to run when plaintiffs had information reasonably sufficient to prompt inquiry into claim). While it is not clear as to when the College first learned that Dalla Pozza posed a risk of harm to its female students, Plaintiff's complaint suggests that the College was continuing to avoid taking corrective action at or before the occurrence of the incidents in question. Thus, assuming, without deciding, that the College knew of Dalla Pozza's propensities but concealed or ignored them while it continued to employ him, Plaintiff's cause of action for negligent supervision accrued on or before the time that the last act of harassment occurred: on April 10, 1996, when Dalla Pozza trapped her in the lady's restroom. *Id.* at ¶ 11. As such, for this claim to be timely, Plaintiff would have had to commence this action by April 10, 1998.

¶12 In her papers, Plaintiff does not dispute when her cause of action accrued or that, absent statutory or equitable tolling, her claims would be time-barred. Plaintiff simply contends, however, that the statute of limitations was tolled while she pursued NMC's administrative grievance procedure. Plaintiff further maintains that 28 U.S.C. § 1367, which invests United States District Courts with supplemental jurisdiction over certain state law claims, tolled the period of limitations while her claim was

pending in federal court and provided her with thirty additional days following the District Court's final dismissal of all claims to file the action here.

¶12 [sic] With regard to Plaintiff's assertions that the statute of limitations was tolled by her compliance with NMC's administrative procedure, "parallel avenues of relief . . . are generally not tolled by a[n] administrative remedy, even though the claims are based on the same facts and directed toward the same end." *See Johnson v. Railway Express Agency*, 421 U.S. 454, 467, 95 S.Ct. 1716, 1723, 44 L.Ed.2d 295 (1975). Citing the general rule, Defendant maintains that Plaintiff's participation in the college's grievance procedure should not operate to toll the statute of limitations here. *See Oden v. Northern Marianas College*, Civil Action No. 98-0020 (D.N.M.I. July 29, 1999) (Order Granting Government Defendants' Motion to Dismiss First Amended Complaint with Leave to Amend) [hereinafter, "Order Granting Motion to Dismiss"]. While it is true that nothing stopped Plaintiff from pursuing her grievance with the College and filing a civil action simultaneously, a well-developed line of cases recognizes that, in the absence of prejudice to a defendant, the running of a limitations period should be tolled when an injured person has several legal remedies and, reasonably and in good faith, pursues one of them. *E.g., Addison v. California*, 21 Cal.3d 313, 319, 146 Cal. Rptr. 224 (1978); *Elkins v. Derby*, 12 Cal.3d 410, 414, 115 Cal.Rptr. 641, 644 (1974). So long as: (1) there is timely notice to the defendant in filing the first claim; (2) the delay did not prejudice the defendant in gathering evidence to defend against the second claim; and (3) the plaintiff acted reasonably and in good faith in filing the second claim, a statute of limitations may be equitably

tolled. *See Collier v. City of Pasadena*, 142 Cal.App.3d 917, 923-24, 191 Cal. Rptr. 681 (1983).

¶13 The application of these factors to the instant case does not make out a persuasive case for equitable tolling. Although Plaintiff filed her administrative claims with the College less than thirty days after the harassment occurred, the filing of a grievance against a member of the faculty would not automatically alert the College to the need to begin investigating facts forming the basis of a negligent supervision claim. *See Collier*, 142 Cal.App.3d at 924-925, 191 Cal. Rptr. at 685 (under ordinary circumstances, the filing of a workers' compensation claim would not equitably toll a personal injury action against a third party who might also be liable for the injury). Further, Plaintiff's sexual harassment and negligent supervision claims derive from separate and distinct facts, and there is no way to assume that the investigation of the first claim would put the College in a position to defend the second. *See Collier*, 142 Cal.App.3d at 925, 191 Cal. Rptr. at 686.[3]

¶14 Finally, although Plaintiff maintains that she promptly filed her claims once the grievance process ended, she points to no statutory or administrative support for her position that she was precluded from filing her

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[3] To prevail on her claim for negligent supervision, Plaintiff must show that the College had notice of Dalla Pozza's harassment, that the College knew Dalla Pozza presented a risk of harm to Plaintiff, and that the College did not act to correct the situation and/or prevent Dalla Pozza from harassing any additional female students; *e.g.*, by assigning him to a position in which he would not have any contact with female students, by ensuring that he sought treatment for his disorder, or by terminating his employment altogether. *See Hutchison ex rel Hutchison v. Luddy*, 560 Pa. 51, 742 A.2d 1052 (1999); *Peck v. Siau*, 827 P.2d 1108 (Wash.App. 1992).

claims against the College until given leave to do so. As the party seeking to invoke equitable tolling, Plaintiff bears the burden of proof to establish her entitlement to equitable relief. *See Phillips v. Donnelly*, 216 F.3d 508, 511 (5th Cir. 2000); *Fillaramo v. Johnston, Lemon & Co., Inc.*, 700 F.Supp. 572, 578 (D.D.C. 1988) (burden of proof to establish equitable tolling is on plaintiff, once accrual of the cause of action has been established). Plaintiff does not contend that she was a victim of active deception, that she was somehow lulled by the College not to pursue a civil action, or that she was unaware of her rights. To the contrary, the court finds the language of the College's administrative procedure on sexual harassment particularly instructive, in that it explicitly cautioned Plaintiff that "[t]he use of these grievance procedures will not constitute waiver by the complainant or respondent of any other legal rights he/she may have." *See* Order Granting Motion to Dismiss at 5-6.

¶15 Accordingly, the court finds that the two-year statute of limitations period governing Plaintiff's negligence claims against the College expired on April 9, 1998, and that the statute was not tolled by Plaintiff's pursuit of her sexual harassment grievance against Dalla Pozza. Having concluded that Plaintiff's negligence claims are time-barred, the court turns next to Plaintiff's claim for due process and equal protection violations.

¶16 The Fourteenth Amendment to the United States Constitution and Article I, §§5[4] and 6[5] of the Commonwealth Constitution guarantee the rights to equal protection and due process of law. Although the Commonwealth's Supreme Court has never addressed whether a cause of action may be asserted directly under the Fourteenth Amendment, the Ninth Circuit has. In *Ward v. Caulk*, 650 F.2d 1144, 1148 (1981), the Ninth Circuit held that there is no direct constitutional cause of action under the Fourteenth Amendment where, as here, § 1983 is available for redress of a plaintiff's claims, even if the plaintiff fails to assert the cause of action. In light of the direct cause of action expressly provided by Article I, § 3(c), the court is particularly reluctant to imply a cause of action where no evidence of the intent to create one exists. *See He* (*Guo Quiong v. Commonwealth*, Civ. No. 99-0268B (Oct. 25, 2000) (Order Denying Defendants' Motion to Dismiss);

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[4] Article I of the CNMI Constitution prohibits the deprivation of life, liberty or property without due process of law. The due process protections of the CNMI Constitution are at least as great as those afforded by the Fourteenth Amendment to the U.S. Constitution. *See, e.g., Office of the Attorney General v. Rivera*, 3 N.M.I. 436 (1993); *Office of the Attorney General v. Deala*, 3 N.M.I. 110 (1992). On at least one occasion, the NMI Supreme Court has indicated that it would apply Art. I, § 5 using the same analysis it would apply under Fourteenth Amendment. See *Commonwealth v. Bergonia*, 3 N.M.I. 22 (1992).

[5] In material part, Article I, § 6 provides that "[n]o person shall be denied the equal protection of the laws." Article I, § 6 further provides that "[n]o person shall be denied the enjoyment of civil rights or be discriminated against in the exercise thereof on account of race, color, religion, ancestry or sex." In construing Article I, § 6 of the CNMI Constitution, the interpretation given to the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution is particularly helpful. *See Taitano v. NMI Softball Ass'n*, Civ. Action No. 93-356 (N.M.I. Super. Ct. Feb. 2, 1994) (Order Granting Defendants' Motion for Summary Judgment at 12).

Joseph v. CNMI, Civ. No. 97-1086A (July 2, 1998) (Order Granting Defendant's Motion to Dismiss and Stay). Since such an action, even if it were available under Article I, §§ 5 and 6 and the Fourteenth Amendment, would clearly be time-barred under 7 CMC § 2503(b) and (d)[6], the court concludes that Plaintiffs' cause of action under the Commonwealth Constitution and the Fourteenth Amendment for violation of equal protection and due process should likewise be dismissed. Having concluded that Plaintiff's claims are time-barred, the court need not address the sovereign immunity defense.

CONCLUSION

¶17 Accordingly, it is hereby ORDERED that Defendants' motion to dismiss the complaint is GRANTED.

SO ORDERED this 10 day of OCTOBER, 2001.

BY THE COURT:

/s/ Timothy H. Bellas
TIMOTHY H. BELLAS,
Associate Judge

[6] *See* note 2, *supra*.